SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 767

DELTA THEATRES, INC.,

Petitioner,

versus

PARAMOUNT PICTURES, INC., ET ALS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Delta Theatres, Inc., Petitioner, prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the above case pending in that court.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court dismissing petitioner's suit were not officially reported, but are reproduced in Appendix "A", infra, pp. 31-34. The opinion of the United States Court of Appeals for the Fifth Circuit affirming the District Court, is reported at 398 F.2d 323 and is reproduced in Appendix "C", infra, pp. 37-42.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit affirming the District Court was entered on June 24, 1968 (Appendix "D", infra. p. 43). A petition for rehearing, timely filed, was denied on August 28, 1968. The jurisdiction of this court is invoked under 28 U.S. Code §1254(1).

QUESTIONS PRESENTED

This case involves the sole question of whether the District Court properly dismissed this civil anti-trust suit under Rule 41(b) of the Federal Rules of Civil Procedure[1] either for failure to prosecute or for violation of a court order where there was no finding that petitioner or its counsel had willfully violated any court order, where other sanctions were available, and where petitioner fully complied with the Federal Rules of Civil Procedure and the local civil rules dealing with the prosecution of civil cases.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT INVOLVED

The constitutional provisions, statutes, and rules of court involved are set forth below in Appendix E, *infra*, pp. 44-48.

STATEMENT

The extraordinary sanction of unconditional dismissal, ordered by the trial judge and affirmed on appeal, if allowed to stand, will end petitioner's lawsuit and

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[1] "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him * * *" Rule 41(b) Rules of Civil Procedure.

bar forever its right to recover its damages caused by defendants' violations of the federal antitrust statutes.

Delta Theatres, Inc., petitioner, filed this action on January 8, 1953, under the provisions of the Sherman Antitrust Act (as amended by the Clayton Antitrust Act).[2] Petitioner is, and at all times pertinent hereto has been, the owner of the Joy Theatre located at 1200 Canal Street in New Orleans, Louisiana. Defendants are the producers and distributors of over 85% of the motion pictures in the United States, and the operators of theatres in New Orleans. Petitioner contends that defendants, in violation of the prohibitions of the federal antitrust laws, conspired to effectively deprive petitioner of Class "A" and Class "AA" motion pictures, and that such acts caused substantial damages to petitioner.

After defendants had filed their answers in late 1953, petitioner undertook extensive discovery procedures, including the taking of depositions of many of defendants' representatives in New York. Among the depositions taken were those of Messrs. Gaston Dureau, Jr. and T. James Howell, representing the Saenger Theatre, John F. Murphy, representing the Loew's State Theatre and MGM Pictures, Matty Polon, buyer and booker for the Orpheum Theatre, William A. Holliday and Hugh Owen of Paramount Pictures, James Rogers Lamantia of RKO, John F. Kirby (Southern Sales Manager), Benjamin Kalmenson (President) and Lu-

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[2]P.R.1. In preparing this record, certain documents were duplicated in printed form. Citations to such portions of the record will be preceded by the letters "P.R." Other portions of the record were filed in original form. Citations to such documents will be preceded by the letter "R".

cas S. Conner (Manager), all of Warner Brothers; William A. Bryant (Manager) and Paul S. Wilson (Assistant Southern Division Sales Manager) of 20th Century Fox Distribution Corporation.[3]

On July 23, 1957 petitioner moved for summary judgment,[4] and in connection therewith submitted a memorandum in support of said motion. This memorandum, 169 pages in length, was filed in the record in original form and outlines the proceedings prior thereto.[5]

On September 13, 1957, all defendants moved for a separate trial on their motion to strike a portion of the complaint[6] on the ground of prescription. On January 16, 1958, the trial judge at that time, Honorable J. Skelly Wright filed an opinion[7] and thereafter an order[8] striking that portion of the claim for damages suffered prior to January 8, 1952. Proper certification having been made, petitioner perfected an appeal to the United States Court of Appeals for the Fifth Circuit, which issued, on November 14, 1958, a judgment affirming Judge Wright's prior holding.[9]

Under Rule 12 of the General Rules of the United States District Court for the Eastern District of Lou-

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[3]See, Affidavit of Ernest A. McKenna, R.72 et seq.
[4]P.R. 71
[5]R. 152, et seq.
[6]P.R. 119
[7]P.R. 120. *Delta Theatres, Inc. v. Paramount Pictures, Inc.*, 158 F. Supp. 644 (D.C.E.D.La. 1958)
[8]P.R. 133
[9]*Delta Theatres, Inc. v. Paramount Pictures, Inc.*, 259 F.2d 563 (5th Cir. 1958).

isiana, as soon as a pending case is at issue as to all parties, any party may "file with the clerk a written request to place the action on the trial calendar of the judge to whom it was allotted. All such actions and any other action that the judge may designate shall then be placed upon the judge's calendar of actions ready for trial. From this calendar actions will be placed upon the day calendar by the Clerk upon direction by the judge."[10]

Pursuant to this Rule, petitioner's counsel made the necessary request by letter of December 10, 1958, and asked that the Clerk refer the case to Judge J. Skelly Wright for the purpose of fixing a pretrial conference so that the case could be placed on the trial calendar.[11] The minutes of the District Court for December 12, 1958, show that petitioner's trial request was duly filed by the Clerk on December 10, 1958.[12]

It is also important for the court to understand the workings of Rule 15 of the Local District Court Rules, reprinted in Appendix "E", infra, pp. 44-48. Under that rule, at least once every sixty days in each section of the court, the Clerk is required to call up to 15 pending

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[10]Rule 12, General Rules of the United States District Court for the Eastern District of Louisiana (West Publishing Company). Your Honors can take judicial notice of these rules. *John W. Johnson, Inc. v. 2500 Wisconsin Ave., Inc.*, 231 F.2d 761, 98 U.S. App. D.C. 8 (D C. Cir. 1956). For the full text of this rule, see Appendix "E", *infra*. pp. 44-48.

[11]P.R. 172.

[12]See, Minute Entry of December 10, 1958, found on the 4th page of the original record, reading as follows: "Flg. TRIAL REQUEST by Pltf.***".

and undisposed of cases, in which no steps or proceedings appear to have been taken within six months. These calls are not made once a trial request has been made. Additionally, pretrial conferences are not held before a trial request has been made.

In summary, under the Local Rules, prior to issue having been joined and a trial request having been filed with the Clerk, a party may receive a docket call at sixty-day intervals, unless action has been taken in the case within the preceding six months. Once the trial request is made, *the ordinary machinery of the court takes over.* The Clerk places the action on the calendar of actions ready for trial. From this calendar, the Clerk, under the direction of the Judge, places the actions upon the day calendar. Thereafter, pretrial conferences are noticed and trial dates scheduled, all without further action by counsel.

Petitioner filed its trial request less than a month after the prior appeal was decided. Before this time, as shown by the Minutes of the court, the case had been called under Local Rule 15 in May of 1956, and May of 1957, the period during which discovery was taking place.[13] In each instance, the case was passed because discovery was being vigorously pursued.

After the trial request was filed by plaintiff on December 10, 1958, no further docket calls were made. There was nothing further for the parties to do but

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[13]See, Minutes of District Court, found on the third page of the original record.

await notice of a pretrial conference and proceed to trial on the date scheduled by the judge.

In fact, the pretrial conference was held on December 15, 1959.[14] At the pretrial conference, Judge Wright ordered (1) that all discovery be completed by February 22, 1960, (2) that "**** on April 4, 1960, **all parties** shall file a Note of Evidence****" listing witnesses and documents, and (3) that, thereafter, rebuttal Notes of Evidence be filed. Since the trial court and the Court of Appeals relied on this Minute Entry in dismissing the suit, we pause here to emphasize that *all parties* (not just petitioner) were ordered to file original Notes of Evidence on April 4, 1960. The Notes of Evidence were not filed by any of the parties, including petitioner and all defendants.

In order that this court should not incorrectly believe that counsel for any of the parties flouted the pretrial order of Judge Wright in not filing the Note of Evidence on the date scheduled, we refer Your Honors to the following facts which were shown by the affidavit of C. Ellis Henican, petitioner's counsel, and were not contradicted.[15]

Under a special order in these proceedings, on December 23, 1959, petitioner's counsel withdrew certain documents, including transcriptions of depositions which had been filed by petitioner in support of its earlier motion for summary judgment.

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[14]Minute Entry, P.R. 157.
[15]P.R. 164, et seq.

During the early part of March, 1960 petitioner's counsel was contacted by Mr. Gibbons Burke, one of the defendants' counsel of record, in connection with the filing of the Notes of Evidence. Mr. Burke stated that he had been working for some time in preparing his list of exhibits, and had already identified and marked over 2500 exhibits; that these exhibits had been divided by individual companies and individual parties and he recommended that petitioner join defendants in preparing and filing a joint note of evidence and that if petitioner were willing to accept this suggestion, he, Gibbons Burke, Esq., would proceed to the completion of his work and would present a first draft to petitioner's counsel some time during the month of April, 1960. A copy of petitioner's counsel's letter to the representatives of his client dated March 8, 1960, outlining these facts was attached to the affidavit of C. Ellis Henican, was admitted without objection, and the facts contained therein were not contradicted.

Petitioner's counsel advised Gibbons Burke, Esq. that his proposal was acceptable and it was agreed that Mr. Burke would proceed to the completion of the proposed first draft for submission at an early date to plaintiff's counsel.

Prior to the end of 1961, and since the completion of the joint Note of Evidence was being delayed, petitioner's counsel requested Judge Wright to schedule a final pretrial conference in this cause so that a specific trial date might be obtained.

However, toward the latter part of December, 1961, Hon. J. Skelly Wright (to whom this case had been allotted) was appointed to the United States Court of Appeals for the District of Columbia Circuit and petitioner's counsel was advised by the office of the Clerk of Court that this case had been transferred to Hon. Herbert W. Christenberry. Petitioner's counsel consulted the Clerk of Court, or one of his deputies, in an effort to determine when a pretrial conference might be held with Judge Christenberry in order to discuss such matters as obtaining a trial date. A copy of a letter to one of petitioner's representatives dated January 5, 1962, was attached to petitioner's counsel's affidavit, was admitted without objection, and was also uncontradicted.

Petitioner's counsel at all times relied upon the local Rules of the court under which the machinery of the court would bring this case to trial without the necessity of further proceedings since the necessary trial request had been made and formally entered on the minutes of the Court.

Since early March, 1960, when Gibbons Burke, Esq., agreed to prepare a first draft of a joint Note of Evidence, neither petitioner nor its counsel has even been notified that the first draft of the Joint Note of Evidence had been completed.

In addition, the case was never called under the provisions of Rule 15 of the Local Rules; nor did any of the defendants, or their counsel, at any time notify petitioner or its counsel, that petitioner was in any way in

default or that defendants expected petitioner to take any steps in addition to awaiting the delivery of the first draft of the joint Note of Evidence. Nor did petitioner receive any notice from the Court, formal or informal.

On the contrary, on several occasions, counsel for petitioner has conferred with counsel for defendants in an effort to compromise this cause, the latest compromise conference having been held during the year 1966.[16]

On February 8, 1967, this case was called for a pretrial conference.[17] Defendants filed a motion to dismiss on the ground of failure to prosecute.[18] On March 31, 1967, the trial judge entered Findings of Fact and Conclusions of Law dismissing the action.[19]

The trial court relied on the proposition that Judge Wright had ordered all parties to file a Note of Evidence on April 4, 1960, and found that none of the parties had complied with the said order. The trial judge also stated that plaintiff had taken no formal action in the case since withdrawing documents from the record on December 23, 1959. The trial judge did not consider the fact that under the local Rules there was no further action for petitioner to take, once the case had been placed on the trial docket, except to await the notice of pretrial conference. Nor did he give any rea-

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[16] P.R. 162, 167
[17] R. 398
[18] P.R. 161
[19] P.R. 174

son why, if all parties had failed to timely file their Notes of Evidence, petitioner should be singled out for punishment, or why the most drastic sanction in the Court's arsenal should be applied: a final dismissal of the petitioner's suit without trial. There was no finding (or allegation or evidence) that petitioner had willfully violated any order of Court or any rule whatever.

Nevertheless, the trial judge believed that he had the discretion to dismiss this action, and entered an order of final dismissal.[20] Petitioner appealed to the United States Court of Appeals for the Fifth Circuit,[21] which affirmed. The Court of Appeals did not state whether the affirmance was for violation of the court order, or for failure to prosecute, and pointed to no further action which it believed petitioner should have taken, once the case was placed on the trial docket. However, that court placed substantial emphasis on the length of time during which this case remained pending. Petitioner filed a timely petition for rehearing which was denied on August 28, 1968.

REASONS FOR GRANTING THE WRIT

We respectfully submit that the order of the District Court (affirmed by the Court of Appeals) dismissing this case has no sound basis in law, in fact, or in justice. The sudden ending of petitioner's lawsuit represents the utilization of the ultimate sanction under circumstances where petitioner was not guilty of the

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[20]P.R. 174, 177.
[21]P.R. 178

slightest degree of fault, where the suit has been prosecuted in full compliance with the Federal Rules of Civil Procedure and the local District Court rules, and where, if petitioner be deemed guilty of technical noncompliance with the order of the Court requiring the filing of Notes of Evidence, each of the defendants was guilty of the same transgression. Due regard for the rights of parties litigant clearly indicates that the dismissal should be reversed.

Rule 41(b) of the Federal Rules of Civil Procedure authorizes a defendant to move for dismissal in two situations: (1) for plaintiff's failure to comply with the Federal Rules or any order of Court, and (2) for plaintiff's failure to prosecute. The defendants' motion to dismiss was grounded solely on the allegation that petitioner had failed to prosecute; but the District and Appellate Courts relied, at least to some extent, on the theory that petitioner disobeyed the order of Judge Wright requiring Notes of Evidence to be filed by April 4, 1960.[22] We will, therefore, treat the question of whether the dismissal was proper under either provision of Rule 41(b) of the Federal Rules of Civil Procedure.

1.

Petitioner's nonwilful failure to comply with Judge Wright's order requiring all parties to file Notes of Evidence on April 4, 1960, should not have resulted in the unconditional dismissal of this suit.

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[22]See, Findings of Fact 1 and 2, P.R. 174.

The basic philosophy of the Federal Rules of Civil Procedure favors trials of disputes on the merits;[23] and a dismissal with prejudice has been uniformly considered a harsh remedy which should be resorted to only in extreme cases.[24]

In a learned address by Judge Sterry R. Waterman of the United States Court of Appeals for the Second Circuit,[25] given at the Seminar on Procedures for Effective Judicial Administration, it was pointed out that the dismissal of a lawsuit is much more drastic than even the contempt sanction. As Judge Waterman stated,[26]

> "The contempt sanction, though wicked sounding, is not nearly as drastic a sanction as dismissal. It only leads to a fine or possible jail

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[23]See, Holtzoff, Origins and Sources of the Federal Rules of Civil Procedure, 30 N.Y.U.L. Rev. 1057, 1059 (1955):

> "The underlying philosophy of the new procedure may be said to consist of two distinct strains. The first is a shift of emphasis from rigid adherence to a prescribed procedure to a distinct effort to bring about the disposition of every case on the merits without regard to compliance with detail-requirements of adjective law and overlooking any discrepancies or error that does not actually effect the substantive rights of the parties . . ."

[24]See, e.g., Thorpe v. Thorpe, 364 F.2d 692 (D.C. Cir. 1966); Meeker v. Rizley, 324 F.2d 269 (10th Cir. 1963); Leong v. Railroad Transfer Service, Inc., 302 F.2d 557 (7th Cir. 1962); Christenson, Seminar on Procedures for Effective Judicial Administration - The Pre-Trial Order, 29 F.R.D. 362, 377 (1961).

[25]Waterman, An Appellate Judge's Approach When Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance With Pretrial Orders, 29 F.R.D. 420 (1961).

[26]F.R.D. 420, 423.

> sentence - its use does not result in the termination of a litigant's cause of action."

An excellent statement of the attitude of the Federal Courts toward the dismissal of a party's cause for the violation of discovery or pretrial orders is found in the Comment, "Dismissal For Failure to Attend a Pretrial Conference and the Use of Sanctions at Preparatory States of Litigation," 72 Yale L. Jour. 819, 828 (1963) as follows:

> "Further, both discovery and the pre-trial conference operate in a procedural system designed to eliminate the plethora of technical motions and victories based on technical errors existing under the earlier practice. Yet if transgressions at pre-trial stages can lead to the imposition of a drastic sanction at each instance of noncompliance, the advantages of the system can become lost in a barrage of cross-motions for dismissal following each technical error in the hope of an easy victory without reaching the merits."

Pursuant to these general policies, the Federal courts have developed certain rules in deciding whether the violation of a court order is sufficient to justify the complete termination of a litigant's cause of action. Under several of these rules, we submit that the dismissal was erroneous.

First, the courts have held that to justify dismissal for disobedience of a court order, the disobedience

must have been willful. A recent recognition of this standard by the Fifth Circuit Court of Appeals is *Woodham v. American Cystoscope Co.*[27] Plaintiff in a products liability case disobeyed several local district court rules, including one requiring a reply brief and counter affidavits in response to motions to dismiss. The Fifth Circuit reversed the dismissal of the complaint. The court emphasized the fact that there had been no willful violation by the plaintiff or her attorney. Judge Wisdom, speaking for the Court, refused to affirm "such a drastically punitive measure" where there had been no willful violation. The following pertinent observation was made at 335 F.2d 551, 557:

> "Rule 1 of the Federal Rules of Civil Procedure is designed to temper the discretionary power of the district court: the rules 'shall be construed to secure the just, speedy and inexpensive determination of every action.' The force of this first and greatest of the Rules should not be blunted by district courts' exaggerating the importance of local rules and enforcing such rules through inappropriate, over-rigorous sanctions. In this case, the excellence of Local Rule 21(a), in general, and the convenience to the court of tailored local procedures, in general, do not justify the hardship of an innocent litigant's being deprived of her day in court."

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[27] 335 F.2d 551 (5th Cir. 1964).

Again, in *Council of Federated Organizations v. Mize,*[28] the trial judge entered a final dismissal on account of the violation by plaintiff of a court order to be present at a hearing. The Fifth Circuit Court of Appeals, through Judge Jones, reversed on the ground that plaintiff's disobedience was not willful or in bad faith, but due to a misunderstanding of the order by counsel. That court concluded as follows:

> "This being so, it follows that the drastic sanction of dismissal is an abuse of discretion. 5 Moore's Federal Practice 1040, Par. 41.12. Cf. Societe Internationale Pour Participations Industrielles Et. Commerciales, S.A. v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed. 2d 1255. The dismissal of the complaint for failure to comply with the court's order was, we conclude, erroneous."

The courts of other circuits and other decisions of the Fifth Circuit are in accord. See: *Meeker v. Rizley,* F.2d 269 (10th Cir. 1963); *Stanley v. Alcock,* 310 F.2d 17 (5th Cir. 1962) (where plaintiff failed to obey order of Court to meet on prescribed day and exchange list of exhibits, it was an abuse of discretion to dismiss the suit on this ground); *Hinson v. Michigan Mutual Liability Co.,* 275 F.2d 537 (5th Cir. 1960) (plaintiff's violation of Court order to submit to physical examination must have been willful to justify dismissal); *Syracuse Broadcasting Corp. v. Newhouse,* 271 F.2d 910 (2d Cir. 1959); *Peterson v. Moore,* 267 F.2d 496 (3d Cir. 1959)

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[28]339 F.2d 898 (5th Cir. 1964).

(dismissal reversed where violation of Court order "*may* have been influenced by a misunderstanding" by counsel); *Castlegate, Inc. v. National Tea Co.*, 34 F.R.D. 221 (D.C. Colo. 1963) (Anti-trust action should not be dismissed where violation of court order was due to misapprehension). See also, *Comment*, 72 Yale L. Jour. 819 (1963).

A rule closely analogous to Rule 41(b) of the Federal Rules of Civil Procedure is Rule 37(b) of the same rules, which provides for the dismissal of a suit where a plaintiff fails to comply with a discovery order. In *Societe Internationale v. Rogers*, 357 U.S. 197, 2 L.Ed. 2d 1255, 78 S.Ct. 1087 (1958), Your Honors unanimously held that a plaintiff's suit could not be dismissed under this rule unless the noncompliance was due to willfulness, bad faith or fault by the petitioner.

Your Honors pointed out that Fifth Amendment due process requirements place severe limitations upon the power of the courts to dismiss an action without a hearing on the merits. Rule 37 was interpreted to require a willful or bad faith violation of a Court order to justify dismissal.

Tested against these standards, it is clear that the order of Judge Wright was not willfully violated. It is hard to imagine that defendants would contend otherwise (and they have never contended otherwise) because the defendants were guilty of identical violations.

The reason for the failure of all counsel to meet the date set by Judge Wright for the filing of the notes of evidence is obvious. When Judge Wright, who was preparing for the trial of this major antitrust case, was elevated to the Court of Appeals for the District of Columbia Circuit, his pre-trial order was considered no longer binding. All counsel obviously shared this belief.

Antitrust litigation is notoriously difficult and time consuming. A great number of depositions had been taken in this case; the witnesses are many; the exhibits (by Mr. Burke's estimate *before* he completed his full list) exceeded 2,500. It is not a case which could have been squeezed easily into some other judge's docket. All counsel believed (reasonably, we submit) that Judge Wright's elevation made his pre-trial deadlines no longer effective. How else explain the failure of all counsel to comply with this pre-trial order?

This being so, the abrupt dismissal by the trial judge who later inherited this case, was clearly erroneous. Even should we concede that Judge Wright's order was technically violated, there has certainly been no showing that the violation was willful as required by the jurisprudence of this Court and all other Federal courts. We might also point out that the trial judge found no willfulness or bad faith.

The courts have also held that where both sides are equally at fault in violating a Court order, the suit should not be dismissed. *Foxboro Co. v. Fischer &*

Porter Co.,[29] *Tinnerman Products v. Garrett Co.*,[30] *Wholesale Supply Co. v. South Chester Tube Co.*[31] The reasonableness of this rule is apparent. There is no good reason to punish only one of two violators, and to reward the party who is equally guilty.

It is clear that this is such a case. If Judge Wright's order was not obeyed, all parties share in the disobedience. In fact, it was the suggestion of defendants' counsel that a joint note of evidence be filed and it was his suggestion that he prepare the initial draft of the note of evidence. He has never done so.

We imply no criticism of defendants' counsel. To the contrary, it is obvious that he concluded, as everyone else concluded, that the removal of Judge Wright would render compliance with his pretrial deadlines unnecessary. We do say, however, that it would come with ill grace if the same counsel would urge that because petitioner did not meet the pretrial deadlines, its entire cause of action should be dismissed with prejudice. Under the cited cases, if all parties were at fault in not filing the note of evidence, the fault was equal. Petitioner should not have been arbitrarily singled out for punishment of the most rigorous kind available to the court and defendants, equally guilty, be rewarded.

There is yet another consideration which shows that the dismissal should be reversed. At the Seminar on

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[29] 29 F.R.D. 522 (D.C.E.D. Pa. 1961).
[30] 22 F.R.D. 56 (D.C.E.D. Pa. 1958).
[31] 20 F.R.D. 310 (D.C.E.D. Pa. 1957).

Procedures for Effective Judicial Administration,[32] both of the judges treating the subject recognized this consideration. A pretrial conference is a desirable tool in the administration of justice; it is not an end in itself. It is designed to facilitate the trial, not to prevent it. Therefore, in cases where a litigant disobeys a pretrial order, only those sanctions which are *appropriate* are justified. Where other sanctions are available, the harsh sanction of dismissal should not be utilized. If dismissal is appropriate, the order should be one of *conditional* dismissal, so that justice may be done.

Honorable A. Sherman Christenson, of the United States District Court for the District of Utah, in his paper given at the 1961 Judicial Seminar,[33] said the following at 29 F.R.D. 362, 377:

> "Without questioning the trial court's ultimate power, there are caveats that its exercises should be appropriate to the problem with which it is confronted and should not go beyond necessary controls. Where defendant failed to comply with an order entered at a pretrial conference requiring him to furnish plaintiff with certain information, as a result of which the plaintiff was required to subpoena witnesses, the court might have required defendant to pay the costs incurred in obtaining the presence of witnesses or may have taxed all the costs up to that time against the defend-

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[32] 29 F.R.D. 191 et seq. (1961)
[33] Christenson, *The Pretrial Order*, 29 F.R.D. 362 et seq. (1961).

> ant, but an order precluding defendant from introducing any evidence relating to the matters as to which information was called for was thought in one case to be too drastic * * * Rule 41(b) authorizes dismissal for noncompliance with a pre-trial order, its application not being limited to orders made at the time of trial; but dismissal with prejudice is a drastic sanction to be applied only in extreme situations and is improper where other sanctions are adequate to deal with any lack of cooperation on plaintiff's part in refining the issues for trial. (Syracuse Broadcasting Corp. v. Newhouse, 271 F.2d 910 (C.A. 2, 1959))"

The same idea was expressed at the same seminar by Judge Sterry R. Waterman,[34] of the United States Court of Appeals for the Second Circuit at 29 F.R.D. 424:

> "The sanctions of dismissal and of judgment by default are severe sanctions, and appellate judges believe they would be remiss in their duties if they chose only to rubber stamp such orders of lower courts. To be sure, these drastic sanctions are indeed provided for by the Rules, but I am certain that the draftsmen did not propose that they should be used liberally in order to eliminate the actual trial of cases.

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[34] Waterman, An Appellate Judge's Approach When Reviewing Sanctions Imposed for the Purpose of Insuring Compliance with Pretrial Orders, 29 F.R.D. 420 et seq. (1961).

> I suggest that appellate judges believe that a district judge should approach with hesitation the use by him of dismissal sanctions. Where an alternative, less drastic sanction, would be just as effective, it should be utilized."[35]

The Fifth Circuit Court of Appeals recognized this policy in *Woodham v. American Cystoscope Co.*, 335 F.2d 551 (5th Cir. 1964). Speaking through Judge Wisdom, the Court recognized that plaintiff had violated several local court rules. The district court dismissed the suit. Reversing, the Court stated the following:[36]

> "In comparable situations, such as a party's failure to answer interrogatories or to attend a hearing, when the failure is caused by the attorney's neglect, courts have usually resorted to conditional orders of dismissal. If this is not enough, courts may resort to disciplinary action against the erring attorney. In *Gamble v. Pope & Talpot, Inc.*, E.D.Pa. 1961, 191 F.Supp. 763; modified 3 Cir., 307 F.2d 729, cert. den'd 1962, 371 U.S. 888, 83 S.Ct. 187, 9 L.Ed. 123, a local rule, as in this case, required the timely filing of a pre-trial memorandum. The district court, unwilling to punish the plaintiff, imposed a fine on the neglectful attorney."

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[35]See also, Comment, *Sanctions at Pre-trial Stages*, 72 Yale L. Juor. 819 (1963).

[36]335 F. 2d 551, 557

In summary, our courts have uniformly recognized that final dismissals under Rule 41(b) should not be utilized if they can be reasonably avoided. Cases should be determined on the merits. The interests of justice are thus best served. Therefore, the use of the willful violation criterion has been established. Conditional orders, less harsh than immediate dismissals, are considered more appropriate methods to deal with noncompliance with orders of court. Dismissals are denied where both parties are at fault. These standards indicate a recognition of the fact that to penalize a litigant by final dismissal takes away a valuable property right without a hearing and is too harsh a sanction except under circumstances most extreme. The trial judge and the Court of Appeals ignored these considerations.

The order of Judge Wright requiring that notes of evidence be filed was considered no longer binding by all parties. There was no willful violation of the order by petitioner. All parties were equally at fault. If any sanction was justified against petitioner alone (which we deny) a less harsh sanction would have been appropriate. A *conditional* order of dismissal is the most extreme sanction which we can believe appropriate under the circumstances. The trial court's use of the ultimate sanction of dismissal, we respectfully submit, was error, and should be reversed.

2.

Petitioner's cause should not have been dismissed for failure to prosecute, because peti-

tioner fully complied with the local rules concerning prosecution of actions.

The trial judge, and the appellate court, we believe, was somewhat ambiguous as to the basis on which this suit was dismissed. Defendants' motion to dismiss was framed exclusively in terms of failure to prosecute.[37] Apparently recognizing that petitioner had done everything required of it to prosecute this case, the trial judge relied at least to some extent on petitioner's alleged disobedience of Judge Wright's order to file notes of evidence.[38]

We have attempted to show, in the first section of our argument, that this suit should not have been dismissed for disobedience of Judge Wright's order. We now turn to the question of whether the suit should have been dismissed for failure to prosecute.

The simple answer is that there was no failure to prosecute. Under the local rules, once the case was placed on the trial docket (and petitioner filed its re-

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[37]P.R. 161

[38]All parties (and the trial judge) were in agreement with the proposition that the issues on this motion should be decided under principles of Federal law and that Louisiana statutes with respect to the prosecution of civil actions, were not binding. See, *Wright v. Lumbermen's Mutual Cas. Co.*, 242 F.2d 1 (5th Cir. 1957) cert. den. 354 U.S. 939, 77 S.Ct. 1397, 1 L.Ed.2d 1536; *Lumbermen's Mutual Cas. Co. v. Wright*, 322 F.2d 759 (5th Cir. 1963); *Byrd v. Blue Ridge Rural Electric Co-op, Inc.*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958). Under *Hanna v. Plummer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), noted, Tul. L. Rev. 202 (1965), in a suit under the federal statutes, the local law is not controlling. See *Wright on Federal Courts*, Chapter 9, p. 216. (West 1963).

quest promptly after the case was remanded to the trial court and the Clerk immediately placed it on the trial docket) there was no further prosecution required of petitioner. Petitioner could only wait for the case to be noticed for a pretrial conference and set for trial under the local rules.

This is evident from the record in this case. Although the court did take a considerable time in calling the second pre-trial conference, it ultimately did so.[39] Its delay in fixing the pretrial conference was perhaps due to the natural reluctance of district courts to undertake the trial of protracted cases, particularly where the "big" case is inherited from another judge. Whatever the reason for the court's delay, it cannot be charged to petitioner.

The trial judge did not indicate any way in which he felt that petitioner could have further prosecuted the case. Nor did the Court of Appeals. Petitioner was ready for trial. It had placed the case on the trial docket. It could only allow the machinery of the court to bring the case to trial; and this is exactly what happened. Neither lower courts nor the defendants have given an expression of opinion of what further prosecution is required under the local rules, once a case has been placed on the trial docket. Discovery had been completed. There was absolutely no further prosecution required of petitioner.

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[39]R. 398

A case similar to that now before the court, is *International Harvester Co. v. Rockwell Spring & Axle Co.*, 339 F.2d 949 (7th Cir. 1964) wherein the original petition had been filed in August, 1956 and plaintiff had taken no action since July, 1958. On February 28, 1964, the trial judge dismissed the suit for failure to prosecute. The Court of Appeals for the Seventh Circuit reversed, pointing out that discovery had been completed and that, as far as the record showed, plaintiff was ready to proceed to trial. There was no failure to prosecute and delay should not be attributed to plaintiff.

The decision expressly relied upon by the district judge in dismissing this cause, and also cited by the Fifth Circuit, is *Salmon v. City of Stuart*, 194 F.2d 1004 (5th Cir. 1952). In that case, the brief *per curiam* opinion devoted only three sentences to the question of dismissal. They read in full as follows:

> "When it comes to the merits, though, we think it plain that the order should be affirmed. Putting to one side that what is being litigated here is old straw which has been thrice threshed, or sought to be threshed, in the courts, it stands undisputed that following the filing of this, the third suit, no action was taken in it by the plaintiffs for one year and three months.
>
> Matters standing thus, the court was fully authorized to dismiss the action."

The *Salmon* case is patently distinguishable. Plaintiffs in that case simply filed a suit and did nothing more. Apparently, no service was made on the defendants, no discovery was prosecuted, and *plaintiffs did not have the case placed on the docket for trial.*

In summary, the judgment of the district court, as affirmed, will inflict a serious injury upon the petitioner, which is innocent of any wrongdoing. Petitioner's cause of action is its property. It will be destroyed. A trial of petitioner's claim before a jury, a right deeply embedded in the laws of this nation, will be abruptly denied an innocent litigant contrary to the standards recognized by this Court in *Societé Internationale v. Rogers,* 357 U.S. 197 (1958) and the policy of the Federal Rules universally recognized.

We have attempted to show in this brief that the circumstances of this case did not justify the judgment of final dismissal. Under applicable local rules, there was no want of prosecution. The order of Judge Wright, the original trial judge, requiring notes of evidence, was made moot by his transfer. All parties so considered it. None of the parties complied.

If a sword of Damocles hung over petitioner's head, petitioner was never notified of the crucial fact. The case was never called under the local rule. Petitioner (or its counsel) was never informed by the court (or by defendant's counsel) that it was in default, or that its cause of action was in jeopardy. Defendant's counsel had agreed to prepare a joint note of evidence. It was never prepared.

A district court does not lack disciplinary authority over an attorney who is willfully disobedient or dilatory. It was neither necessary nor proper for the district judge to mete out the most severe sanction in the arsenal of that court under the facts of this case. Many alternatives were available, if petitioner had been in default. Petitioner could have been ordered to comply. Petitioner could have been assessed with the costs incurred on account of non-compliance. A conditional order of dismissal could have been entered.

If the responsibility for the delay must be placed on anyone, it should be placed on the defendants or on the trial court. Petitioner exhausted every step necessary under local rules to bring this case to trial. Service was promptly had. Discovery was undertaken and completed. The case was entered on the trial docket. Nothing more is required under the local rules.

The final dismissal of this case seems to us to be contrary to the most fundamental ideas of fairness and justice. The decisions of this and other courts, the thoughtful writings of scholars considering these problems, and the simple requirements of justice support our plea that a writ be granted and that the dismissal be reversed.

There was an undercurrent of concern by the trial and appellate courts for the problem of court congestion. It is, of course, desirable that the congestion of court dockets be reduced in every way possible consistent with the fair administration of justice. But that praiseworthy objective should not be sought in a way

that undercuts the very purposes for which courts were created: to resolve disputes by trials on the merits and to render judgments in accordance with the substantial rights of the parties. The ultimate solution to the congestion problem would be for the courts to dismiss all pending cases. No one would propose such a solution.

If this case is not reversed, some docket congestion will be removed. But a faultless party will be unjustly deprived of its right to trial.

CONCLUSION

The decision below is erroneous and far-reaching in its effect. The present petition for a writ of certiorari, it is respectfully submitted, should be granted.

HENICAN, JAMES &
CLEVELAND,
C. ELLIS HENICAN

By: _____
C. ELLIS HENICAN
Suite 2601, 225 Baronne Street
New Orleans, Louisiana 70112
ATTORNEYS FOR DELTA
THEATRES, INC.

CERTIFICATE OF SERVICE

I hereby certify that copies of the above and foregoing Petition for a Writ of Certiorari have been deposited in the United States Mail, with postage prepaid, properly addressed to Gibbons Burke, Esq., and Ashton Phelps, Esq., counsel of record for all other parties to this cause, this ____ day of November, 1968.

C. ELLIS HENICAN

APPENDIX "A"

Findings of Fact and Conclusions of Law of the District Court

The findings of fact and conclusions of law of the District Court, printed at pages 174, et seq. of the record, were as follows:

"This cause came on for hearing on March 29, 1967, on defendant's motion under Rule 41(b) of the Federal Rules of Civil Procedure to dismiss the action for failure of the plaintiff to prosecute or to comply with an order of Court.

There were present:
C. Ellis Henican, Esq.
For Plaintiff
Ashton Phelps, Esq. and
Gibbons Burke, Esq.
For Defendants

Upon the record and the memoranda and affidavit submitted by counsel, and the arguments thereupon, the Court now makes the following

FINDINGS OF FACT

1. On December 16, 1959, an order was entered by the Court through the Honorable J. Skelly Wright, then Judge of this Court, wherein it was ordered in part:

> '* * * that on April 4, 1960, all parties shall file a Note of Evidence (a) stating the names of the witnesses who will be used, with a short synopsis of the testimony to be given by each; (b) listing the documents, properly identified by trial numbers, which will be offered in evidence, copies of these documents, properly marked for identification, to be filed the Note of Evidence.'

2. Neither party complied with the aforesaid order.

3. This Court issued its order for a pretrial conference to be held on Tuesday, March 7, 1967.

4. Upon motion of plaintiff, said pretrial conference was, on February 24, 1967, continued indefinitely.

5. On March 2, 1967, defendants filed and gave notice of the motion to dismiss herein involved. The notice stated that the matter would be brought on for hearing on March 8, 1967.

6. Pursuant to plaintiff's motion, said hearing was continued twice: first, until March 22, 1967, and, again, until March 29, 1967.

7. The record of this case does not disclose that any action was taken by plaintiff after the entry of an order herein on December 23, 1959, granted by Judge Herbert W. Christenberry, authorizing plaintiff to withdraw certain documents from the record.

8. This action would involve testimony with respect to transactions which occurred as early as 1947.

9. There have been several deaths among the witnesses whose testimony would be relied upon by the defendants; and others have left the employ of the respective defendants; and still others have withdrawn from the motion picture business and have engaged in other businesses.

10. There have been several deaths among counsel for the defendants.

11. The defendants have been prejudiced by the lack of diligence on the part of the plaintiff herein.

The Court also enters the following

CONCLUSIONS OF LAW

1. Rule 41(b) of the Federal Rules of Civil Procedure provides, in part:

> 'For failure of plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of any claim or action against him. * * *'

2. Whether or not an action should be dismissed pursuant to said rule is a matter within the discretion of the Court. See *Tradeways Incorporated v. Chrysler Corporation*, 342 F.2d 350 (2d Cir. 1965).

3. It has been held in *West v. Gilbert*, 361 F.2d 314 (2d Cir. 1966), that the District Court has power to dismiss for failure to prosecute, on its own motion. The dismissal is discretionary in the District Court.

4. The Court of Appeals for the Fifth Circuit has held in Salmon v. City of Stuart, 194 F.2d 1004 (1952), that in an action in which the plaintiff took no action for one year and three months, the Court was fully authorized to dismiss the action. In the per curiam affirming the dismissal the Court referred to:

Hicks v. Bekins Moving & Storage Co., 9 Cir., 115 F.2d 406
Partridge v. St. Louis Joint Stock Land Bank, 8 Cir., 130 F.2d 281
Moore's Federal Practice, 1st Ed., p. 3043
Zielinski v. U.S., 2 Cir., 120 F.2d 792
Shotkin v. Western, 10 Cir., 169 F.2d 825

5. This Court should exercise its discretion in determining whether or not to dismiss the action.

6. This Court does hereby exercise its discretion and does hereby order that said action be, and it hereby is, dismissed.

New Orleans, Louisiana, March 31, 1967.

S/ Fred J. Cassibry
JUDGE"

APPENDIX "B"

Judgments of the District Court

On April 6, 1967, the following judgment, printed at pages 177, et seq. of the record, was entered by the District Court:

JUDGMENT

"Considering the opinion of the Court filed herein on March 31, 1967;

ACCORDINGLY, IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendants, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Paramount Gulf Theatres, Inc., Metro-Goldwyn-Mayer, Metro-Goldwyn-Mayer Distributing Corporation of Texas, Radio-Keith-Orpheum, Inc., RKO Radio Pictures, Inc., RKO Theatres, Inc., Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation, Twentieth Century-Fox Film Corporation, Twentieth Century-Fox Distributing Corporation, United Artists Corporation, Columbia Pictures Corporation, and Columbia Pictures of Louisiana, Inc., and against the plaintiff, Delta Theatres, Inc., dismissing said plaintiff's suit with costs.

Dated at New Orleans, Louisiana on this 6th day of April, 1967.

S/ A. Dallam O'Brien, Jr.
A. DALLAM O'BRIEN, JR.,
CLERK"

On May 1, 1967, the following amended judgment of the District Court, printed at page 179 of the record, was entered by the District Court:

"Considering the opinion of the Court filed herein on March 31, 1967, and the fact that inadvertently there were omitted from the judgment entered herein on April 6, 1967, the names of two of the defendants;

ACCORDINGLY, IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendants, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Paramount Gulf Theatres, Inc., Metro-Goldwyn-Mayer, Inc., Metro-Goldwyn-Mayer Distributing Corporation of Texas, Radio-Keith-Orpheum, Inc., RKO Radio Pictures, Inc., RKO Theatres, Inc., Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation, Twentieth Century-Fox Film Corporation, Twentieth Century-Fox Distributing Corporation, United Artists Corporation, Columbia Pictures Corporation, Columbia Pictures of Louisiana, Inc., Orpheum Theatre & Realty Co., Ltd. and Canal Realty & Improvement Co., Ltd., dismissing said plaintiff's suit with costs.

Dated at New Orleans, Louisiana, on this 1 day of May, 1967.

S/ Fred J. Cassibry
UNITED STATES
DISTRICT JUDGE"

APPENDIX "C"

Opinions of the United States Court of Appeals For the Fifth Circuit.

The opinion of the United States Court of Appeals for the Fifth Circuit was handed down on June 24, 1968, and reprinted at page 184, et seq. of the record. It is officially reported at 398 F.2d 323, and reads as follows:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25068

DELTA THEATRES, INC.,
Appellant,

versus

PARAMOUNT PICTURES, INC., ET AL,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(June 24, 1968)

Before COLEMAN and CLAYTON, Circuit Judges, and JOHNSON, District Judge.

CLAYTON, Circuit Judge: On December 15, 1959, approximately seven years after the commencement

of this antitrust action, all the parties were ordered to file as a pretrial procedure a "note of evidence" by April 4, 1960. According to the order, this instrument was to contain names of witnesses and synopses of their expected testimony and a list of documents identified by trial numbers, which were to be offered at trial. These notes were never filed. On March 2, 1967, appellees moved to dismiss "on the ground that plaintiff has failed to prosecute this action since December 15, 1960". After several continuances obtained by appellant, this motion was heard and sustained. A final judgment dismissing the complaint with prejudice for failure to prosecute was entered from which Delta appeals. We affirm.

In these days of crowded dockets, increasingly complex commercial situations, either resulting in or arising out of protracted litigation, a judge seeking to organize the business of his court in an orderly way must have at his disposal efficient machinery for the processing of cases and the conduct of litigation. Under the Federal Rules of Civil Procedure, particularly Rule 16, the district judge is given the authority to promulgate rules for and supervise the pretrial phase of litigation in this court with the view of "sifting the issues and reducing the delays and expense of trial so that a suit will go to trial only on questions as to which there is an honest dispute of fact and law". Pretrial Procedure, A Statement of its Essentials, by Honorable Alfred P. Murrah, 15 F.R.D. 417.

Incidental to that supervisory responsibility, there must be, and is, vested in the judge the correlative

authority to "impose reasonable sanctions for the breach of reasonable rules". *Gamble v. Pope and Talbot, Inc.*, 307 F.2d 729 (3 Cir. 1962) (dissenting opinion). Rule 41(b), Federal Rules of Civil Procedure, on defendant's motion, authorizes dismissal with prejudice of an action "for failure of the plaintiff to prosecute or to comply with these rules *or any order of court* . . . ." (Emphasis added.) In the exercise of his discretion, the district judge here utilized this sanction, and the question presented on this appeal necessarily is whether *vel non*, on the facts and circumstances of this case, this discretion was abused.

The tenor of the cases in this circuit has been to permit dismissal as a sanction "only in the face of a clear record of delay or contumacious conduct by the plaintiff . . . ." *Durham v. Florida East Coast Ry. Co.*, 385 F.2d 366 (5 Cir. 1967). It has recently been stated, with respect to dismissal as a sanction, "that such action is too harsh except in extreme circumstances". *Flaska v. Little River Marine Construction Company, Inc.*, 5 Cir. 1968, ____ F.2d ____ [No. 22367, February 8, 1968]. Moreover, where there was an absence of fact from which it could be inferred that plaintiff "had long been deliberately proceeding in a dilatory fashion," *Woodham v. American Cystoscope Company*, 335 F.2d 551 (5 Cir. 1964); or where it could be "inferred from the record that counsel for the plaintiff misunderstood the district court's order," *Council of Federated Organizations v. Mize*, 339 F.2d 898 (5 Cir. 1964); or where the cause of action "was less than a year old at the time it was dismissed," *Flaska v. Little River Marine Construction*

Company, Inc., supra, at p. 8, this court has said that the district court exceeded the bounds of judicial discretion in dismissing the plaintiff's complaint with prejudice.

However, where plaintiffs "have not once appeared and have given no indication that they intended to do so in the future," *Durgin v. Graham,* 372 F.2d 130 (5 Cir. 1967); or where following the filing of suit, no action was taken in it by plaintiffs for one year and three months, *Salmon v. City of Stuart,* 194 F.2d 1004 (5 Cir. 1952); or where plaintiff's attorney failed to appear in a pretrial conference in a case pending for more than three years, *Salmon v. City of Stuart, supra;* dismissal as a sanction and as a proper exercise of discretion by the trial court has been approved by this court.

The district judge here found that the order to file a note of evidence and list of documents was not complied with; that an order for a pretrial conference was continued indefinitely on appellant's motion; that a hearing on the motion to dismiss for failure to prosecute was continued twice on plaintiff's motion; that no action had been taken by plaintiff in this cause since December 23, 1959 and that since transactions were involved in this case dating from 1947, the defendants have been prejudiced by plaintiff's lack of diligence.

It would be an intolerable situation which would not permit a dismissal with prejudice in circumstances such as those present in this case. Approxi-

mately fourteen years after suit was filed, with no action taken for about seven years, plaintiff can not be heard to complain that his case has now been dismissed with prejudice. It is surprising that such action was not taken by the district court sua sponte, long before defendants filed their motion. *Link v. Wabash R. Co.*, 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962);[1] *West v. Gilbert*, 361 F.2d 314 (2 Cir. 1966), cert. den. 385 U.S. 919, 87 S. Ct. 229, 17 L. Ed. 2d 143; *Shotkin v. Westinghouse Elec. & Mfg. Co.*, 169 F.2d 825 (10 Cir. 1948); *American Nat. Bank & Trust Co. v. United States*, 142 F.2d 571 (D.C. Cir. 1944); and *Hicks v. Bekins Moving & Storage Co.*, 115 F.2d 406 (9 Cir. 1940).

No plaintiff should be permitted to sleep on his rights and harass a defendant with such unreasonable delay. It can not be said that the district court abused its discretion in dismissing this complaint with prejudice. In fact, we hold that its questioned action was sound and proper.

AFFIRMED.

The opinion of the United States Court of Appeals for the Fifth Circuit on petition for rehearing en banc was handed down on October 28, 1968 and is reprinted at page 200 of the record. It reads as follows:

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[1]In the same case *Link v. Wabash R. Co.*, 291 F.2d 542 (7 Cir. 1961) at 545, the court used language which it is appropriate to quote here, "It is sheer sophistry to argue that the trial court has no inherent power to enforce its rules, orders or procedures and to impose appropriate sanctions for failure to comply." The essence of this language is noted in Sanctions at Pretrial Stages, 72 Yale L.J. 819, 821 (1963).

"Before COLEMAN and CLAYTON,* Circuit Judges, and JOHNSON, District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

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*Judge Clayton, the author of the opinion on which rehearing was sought, did not participate in this decision because of sudden and unexpected illness."

APPENDIX "D"

Judgment of the United States Court of Appeals for the Fifth Circuit.

The judgment of the U. S. Court of Appeals for the 5th Circuit issued on June 24, 1968, is reprinted at page 189 of the record, and reads as follows:

"This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Delta Theatres, Inc., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court."

APPENDIX "E"

Constitutional Provisions, Statutes and Rules of Court Involved.

Constitution of the United States:

The Fifth Amendment to the Constitution of the United States reads, in pertinent part as follows: "No person shall . . . . be deprived of life, liberty or property, without due process of law. . . ."

Federal Rules of Civil Procedure:

Rule 41(b) of the Federal Rules of Civil Procedure reads, in pertinent part, as follows: "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. * * *"

Rules of Court:

Effective June 1, 1944, Rule 3 of the Civil Rules of the United States District Court for the Eastern District of Louisiana, read as follows:

"RULE 3
PREPARATION OF TRIAL CALENDARS

At any time after the service of the answer to the complaint, any party to a civil action pending in this court may serve on all the other parties and file with the clerk a written

request to place the action on the trial calendar. All actions in which such a request has been thus served and filed unless the court shall otherwise direct, and all other actions which the court may designate, shall be placed on the calendar of actions ready for trial. From this calendar, actions will be placed upon the day calendar by the clerk under the direction of the judge."

By order dated November 12, 1965, effective December 1, 1965, General Rules of the United States District Court for the Eastern District of Louisiana were enacted. Among those rules was Rule 12, which reads as follows:

"RULE 12
TRIAL CALENDARS

Except as to Criminal Cases, at any time after any case or proceeding pending in this Court is at issue as to all parties thereto, any party may serve on all the other parties and file with the clerk a written request to place the action on the trial calendar of the judge to whom it was allotted. All such actions and any other actions that the judge may designate shall then be placed upon the judge's calendar of actions ready for trial. From this calendar actions will be placed upon the day calendar by the Clerk upon direction by the judge."

The June 1, 1944 General Rules of the United States District Court for the Eastern District of Louisiana (as amended April 7, 1953) included Rule 12, which read as follows:

"RULE 12
CALLS OF DOCKET

General Call of Docket

On the third Monday of May and November of each year, or on such other days at least once each 6 months as the court may by order designate, the clerk under the supervision of the judge and in open court, shall call all actions pending and undisposed of in which no steps or proceedings appear to have been taken within 6 months.

Notice of all general calls of the docket shall be given by mailing copies of such notice to all attorneys of record in each case to be called. If none of the parties or their attorneys appear at the time and place stated for the general call and make answer when an action is called, the court may direct the clerk to enter an order dismissing the action for want of prosecution. (As amended April 7, 1953)

If at the call it is shown that the failure to take steps or proceedings is not due to the plaintiff's fault or lack of reasonable diligence

on his part the action will hold its place on the docket.

The court may make such other orders as may facilitate the prompt and just disposition of any action."

By order of January 5, 1961 the preceding rule was amended, as follows:

"UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

ORDER

As provided in Rule 12 of the Local General Rules of this Court, the Court now designates Wednesday of each week as a day for calling all cases under said rule.

The Clerk is directed to place up the call calendar, unless circumstances will not otherwise permit, ten (10) cases per Wednesday for each judge for call under said Rule 12.

/s/ Herbert W. Christenberry
UNITED STATES DISTRICT JUDGE
/s/ J. Skelly Wright
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana,
January 5, 1961"

By order dated November 12, 1965, effective December 1, 1965, General Rules of the United States District Court for the Eastern District of Louisiana were enacted. Among those rules was Rule 15, which reads as follows:

"RULE 15
CALLS OF THE DOCKET

A. *Cases Not Active For 6 Months.*

At least once every 60 days in each section of the Court, unless otherwise ordered by the judge thereof, the clerk shall call up to 15 cases, pending and undisposed of, in which no steps or proceedings appear to have been taken within 6 months. The call shall be for the regular day and time assigned for hearing motions and the clerk shall give written notice of such call to counsel of record.

B. *Failure to Show Good Cause.*

Unless good cause is shown at the time of the call why no action has been taken, the case may be dismissed. If the case is not dismissed, the Court may make such other orders as may facilitate its prompt and just disposition."

LIBRARY
SUPREME COURT, U. S.

DEC 16 1968

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1968.

No. 767

DELTA THEATRES, INC.,
Petitioner,

versus

PARAMOUNT PICTURES, INC., ET AL.,
Respondents.

OPPOSITION TO ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

HARRY McCALL, JR.,
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New Orleans, La. 70112,
Counsel for Respondents.

GIBBONS BURKE,
1500 NBC Building,
New Orleans, La. 70112,
ASHTON PHELPS,
CHARLES M. LANIER,
Hibernia Bank Bldg.,
New Orleans, La. 70112,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

No. 767.

DELTA THEATRES, INC.,
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Respondents.

OPPOSITION TO ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Paramount Pictures, Inc., Paramount Film Distributing Corporation, Paramount Gulf Theatres, Inc., Metro-Goldwyn-Mayer, Inc., Metro-Goldwyn-Mayer Distributing Corporation of Texas, Radio-Keith-Orpheum, Inc., RKO Radio Pictures, Inc., RKO Theatres, Inc., Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation, Twentieth Century-Fox Film Corporation, Twentieth Century-Fox Distributing Corporation, United Artists Corporation, Columbia Pictures Corporation, Columbia Pictures of Louisiana, Inc., Orpheum Theatre & Realty Co., Ltd. and Canal Realty & Improvement Co., Ltd., oppose the issuance of a writ in this case.

STATEMENT.

The complaint was filed on January 8, 1953. After petitioner's appeal to the United States Court of Appeals for the Fifth Circuit (the partial judgment in favor of respondents was affirmed on November 14, 1958, *Delta Theatres, Inc. v. Paramount Pictures, Inc.*, 259 F. 2d 563), the district court ordered a pretrial conference to be held on June 11, 1959. Petitioner moved for a continuance and the conference was continued to be reassigned.

On December 15, 1959, the pretrial was held and there was then entered the order with respect to the filing on April 4, 1960, of a Note of Evidence. Two years later, Hon. J. Skelly Wright, the trial judge who entered the order, was appointed to the Court of Appeals for the District of Columbia, which office he assumed in April, 1962.

Nothing was done in the action until:

On February 8, 1967, the district court issued notice of pretrial conference, which, upon motion of petitioner, was continued.

On March 3, 1967, respondents filed a motion to dismiss under FRCP 41(b). On 2 occasions the hearing on this motion was continued pursuant to petitioner's motions.

On March 31, 1967, the District Court, pursuant to Rule 41(b), dismissed the action.

ARGUMENT.

I.

Rule 19 of the Revised Rules of this Court.

This petition does not present any of the considerations referred to in Rule 19, 1, (b). The decision of the court of appeals is not in conflict with any decision of another court of appeals. The court of appeals has not decided an important question of federal law which has not been settled. See *Link v. Wabash L. Co.*, 370 U.S. 628, 82 S. Ct. 1386, 8 L. Ed. 2d. 734 (1962). It has not departed from the accepted and usual course of judicial proceedings.

It appears from the decision of the circuit court in this action that petitioner petitioned that court for a rehearing en banc and "no member of this panel nor Judge in regular active service on the Court having requested the Court be polled on rehearing en banc," the petition for rehearing was denied. (Petitioner's brief, p. 42.) Thus, in a sense, the decision of the court of appeals was not only by the panel, but received some consideration from all of the judges in active service on that court.

It is submitted that the district judge exercised soundly the discretion vested in him and that the court of appeals properly affirmed such exercise.

II.

Judge Wright's Order of December 15, 1959 was not Voided by his Appointment to Another Court.

It would be a novel doctrine that the translation of a judge to another court from the court in which he entered an order renders such order null.

Petitioner's petition for writs states:

> "Antitrust litigation is notoriously difficult and time consuming. A great number of depositions had been taken in this case; the witnesses are many; the exhibits (by Mr. Burke's estimate before he completed his full list) exceeded 2,500. It is not a case which could have been squeezed easily into some other judge's docket. All counsel believed (reasonably, we submit) that Judge Wright's elevation made his pretrial deadlines no longer effective. How else explain the failure of all counsel to comply with this pre-trial order?" (p. 18.)

Even assuming the existence of such doctrine, there was an interregnum of 2 years between the entry of the order and the judge's appointment to another court; and there was an interregnum of substantially 2 years between April 4, 1960, the critical date fixed in the order, and the Judge's translation to the Court of Appeals for the District of Columbia.

This time lapse of 2 years is alone enough to establish failure to prosecute. *Salmon v. City of Stuart,* 194 F.2d. 1004 (5 Cir. 1952).

III.

Dismissal under FRCP 41(b) was Proper in the District Court and Properly Affirmed in the Circuit.

Both the district and the circuit court took into account all the circumstances that attended the action. (Petitioner's brief, Appendix A, pp. 32/33—Findings of Fact by the district court.)

The court of appeals said (opinion):

> "The district judge here found that the order to file a note of evidence and list of documents was not complied with; that an order for a pretrial conference was continued indefinitely on appellant's motion; that a hearing on the motion to dismiss for failure to prosecute was continued twice on plaintiff's motion; that no action had been taken by plaintiff in this cause since December 23, 1959 and that since transactions were involved in this case dating from 1947, the defendants have been prejudiced by plaintiff's lack of diligence." (p. 40 of Petitioner's Brief.)

Indeed, the court of appeals noted that the district court, in view of the seven-year delay by petitioner, should have dismissed sua sponte:

> "It would be an intolerable situation which would not permit a dismissal with prejudice in circumstances such as those present in this case. Approximately fourteen years after suit was filed, with no action taken for about seven years, plaintiff can not be heard to complain that his case has now

been dismissed with prejudice. It is surprising that such action was not taken by the district court sua sponte, long before defendants filed their motion. Link v. Wabash R. Co., 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d. 734 (1962); West v. Gilbert, 361 F. 2d. 314 (2 Cir. 1966), cert. den. 385 U.S. 919, 87 S. Ct. 229, 17 L. Ed. 2d. 143; Shotkin v. Westinghouse Elec. & Mfg. Co., 169 F. 2d. 825 (10 Cir. 1948); American Nat. Bank & Trust Co. v. United States, 142 F. 2d. 571 (D.C. Cir. 1944); and Hicks v. Bekins Moving & Storage Co., 115 F. 2d. 406 (9 Cir. 1940)." (pp. 40/41 of Petitioner's Brief.)

IV.

No Duty Required Respondents to Proceed.

FRCP 41(b) puts the onus on petitioner to prosecute. In this connection we refer to the order of December 15, 1959. It required all parties to file on April 4, 1960, a Note of Evidence. This Note includes not only a listing and numbering of all documents but a summary of the testimony that is expected to be given by the witnesses.

Respondents had, in early March, 1960, identified and marked more than 2500 exhibits (P.R. 164, et seq.). This is set forth in a letter dated March 8, 1960, from counsel for Petitioner to officers thereof.

It is submitted that it is clear from that letter that the only possible subject of agreement was the documents. It would be impossible for counsel for respondents to prepare summaries of testimony expected to be

given by witnesses—as yet unnamed—who would be tendered by petitioner. Even if respondents had agreed to undertake that impossible task, seven years passed after the delivery date without action by petitioner. There is no evidence of any demand upon, or request to, respondents to supply petitioner with a "first draft".

V.

CONCLUSION.

Every contention advanced here was presented to the district court and the court of appeals and was rejected: "with no action taken for about seven years, plaintiff can not be heard to complain that his case has now been dismissed with prejudice."

Respectfully submitted,

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CERTIFICATE.

The undersigned attorney for respondent hereby certifies that copies of the above and foregoing brief in opposition have been served on all attorneys of record.

New Orleans, La., December ...., 1968.

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HARRY McCALL, JR.